Supreme Court, U. S.
FILED
MAR 2 1976
MICHAEL RODAK, JR., CLERK

No. 75-1240

In the Supreme Court of the United States

OCTOBER TERM, 1975

TOMAS RODRIGUEZ and ANGEL MANUEL SANTANA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

THOMAS P. DURKIN
ACKERMAN, DURKIN & EGAN
100 N. LaSalle Street
Chicago, Illinois 60602
(312) 332-2891
Attorneys for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

INDEX

PAGE

Citations to Opinions Below 2

Jurisdiction 2

Questions Presented 3

Constitutional Provision Involved 3

Statement 3

Reasons for Granting the Writ 8

Argument 8-15

I. Whether the District Court committed prejudicial error in refusing to allow the petitioners to withdraw their guilty plea where: 2

a) The motions were in writing and filed several weeks prior to the imposition of sentence and 2

b) Where the Government nowise claimed any prejudice had the court allowed the motion and granted the petitioners a trial? 23

II. Whether there exists an accepted standard to determine when a guilty plea may be withdrawn prior to imposition of sentence (cf., Rule 32(d); Fed.R.Crim.P.)? 2

III. Whether the total lack of any standard in Rule 32(d) coupled with a lack of direction from this court and a total split in the several circuits is sufficient to warrant that this case be reviewed? 3

PAGE

IV. Whether petitioners were denied both 5th and 6th Amendment rights when the trial court refused to grant them an opportunity to withdraw the guilty pleas and stand trial? 3

Conclusion 15

Appendices:

App. A—Opinion Below .....App. 1

App. B—Rehearing Denied .....App. 7

App. C—Rule 32(c) Fed.R.Crim.P. .....App. 8

App. D—Presentence Investigation Statement of Petitioner Angel Manuel Santana .....App. 10

App. E—Presentence Investigation Statement of Petitioner Tomas Rodriguez .....App. 13

TABLE OF CASES

Dandridge v. United States, 356 U.S. 259 (1958) 8

Dukes v. Warden, et al., 406 U.S. 250 (1972) 9, 12, 15

Hampton v. United States ..... U.S. ....., *cert. granted,* 95 S.Ct. 1445 (1975) 14

High v. United States, 288 F.2d 427 (D.C. Cir., 1960) 11

Kadwell v. United States, 315 F.2d 667 (9th Cir., 1963) 11, 12

Kercheval v. United States, 274 U.S. 220 (1927) 8, 11

Nagelberg v. United States, 377 U.S. 266 (1964) 8, 9

Poole v. United States, 250 F.2d 396 (D.C. Cir., 1957) 11, 12

Santobello v. New York, 404 U.S. 257 (1971) 8, 9, 10, 15

PAGE

United States v. Dixon, 504 F.2d 69 (3rd Cir., 1974) 13

United States v. Gearhart, 272 F.2d 499 (D.C. Cir., 1959) 13, 14

United States v. Jackson, 390 U.S. 570 (1968) 9, 13

United States v. Presley, et al., 478 F.2d 163 (5th Cir., 1973) 12

United States v. Stayton, 408 F.2d 559 (3rd Cir., 1969) 11, 12

United States v. Wells, 430 F.2d 225 (9th Cir., 1970) 13

CONSTITUTIONAL PROVISIONS

United States Constitution

5th Amendment 3, 4, 9, 10, 13

6th Amendment 3, 4, 9, 10, 13

STATUTES AND OTHER AUTHORITIES

Federal Rules of Criminal Procedure

Rule 11 4

Rule 32(c) 4

Rule 32(d) 2, 3, 11, 15

21 U.S.C. §841(a)(1) 4

28 U.S.C. §1254(1) 2

A.B.A. Standard, Pleas of Guilty §2.1(b) 11

In the
Supreme Court of the United States

OCTOBER TERM, 1975

NO.

TOMAS RODRIGUEZ and ANGEL MANUEL SANTANA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Tomas Rodriguez and Angel Manuel Santana, pray that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the Seventh Circuit, affirming the judgment of conviction of violation of Federal Narcotic Law(s) entered in the United States District Court for the Northern District of Illinois, Eastern Division (Chicago, Illinois).

CITATIONS TO OPINION BELOW

The opinion of the Court of Appeals is not officially reported, nor will it be.[1] The affirmation order is reproduced as Appendix "A", *infra*.

JURISDICTION

The Judgment of the Court of Appeals was entered on January 22, 1976 (Appendix A, *infra*). A timely Petition for rehearing with a suggestion for rehearing en banc was denied on February 23, 1976 (Appendix "B").

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

I. Whether the District Court committed prejudicial error in refusing to allow the petitioners to withdraw their guilty plea where:

(a) The motions were in writing and filed several weeks prior to the imposition of sentence and

(b) Where the Government nowise claimed any prejudice had the court allowed the motion and granted the petitioners a trial?

II. Whether there exists an accepted standard to determine when a guilty plea may be withdrawn prior to imposition of sentence (cf., Rule 32(d); Fed.R.Crim.P.)?[2]

[1] Circuit Rule 28, (rules of the 7th Circuit) provide for unpublished orders. The affirmation of this conviction is(was) by an unpublished order.

[2] Rule 32(d) reads:

> Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or *nolo contendere* may be made only before sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

III. Whether the total lack of any standard in Rule 32(d) coupled with a lack of direction from this court and a total split in the several circuits is sufficient to warrant that this case be reviewed?

IV. Whether petitioners were denied both 5th and 6th Amendment rights when the trial court refused to grant them an opportunity to withdraw the guilty pleas and stand trial?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States of America

Amendment V

No person shall be * * * deprived of life, liberty, or property without due process of law, * * *

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *

STATEMENT

This case was born in May or June, 1974. It was then that a now Government informer, Armando Martinez,[3] presented another Government informer, Mario Torres to petitioners, Rodriguez and Santana. The introductions took place at a food store operated by Rodriguez and his family. By and by heroin passed from petitioners to Torres and on July 15, 1974 both petitioners were arrested after Torres transferred the heroin he received from the Petitioners to waiting D.E.A. agents.

[3] During the hearings which followed the guilty plea Martinez was not mentioned by the Government. There is no doubt that he is now an informer; there may well be some dispute as to whether he was an informer in May or June, 1974.

Post-arrest each petitioner was admitted to bail and represented by private counsel.

With the absolute consent of each petitioner their counsel met with government counsel in the hopes of striking a plea bargain. In December, 1974 counsel for the petitioners and government counsel agreed that upon a plea of guilty to an information the Government would recommend a 2 year prison term and drop another pending (but unindicted matter) as to Rodriguez. On January 7, 1975 each Petitioner entered his guilty plea to an information charging a violation of 21 U.S.C. 841(A)(1).[4]

The Court accepted the plea and advised that he (the Trial Judge) was not bound by any plea bargain. The plea bargain was fully set forth and Rule 11 was the subject of complete compliance.[5]

Sentencing was set for February 19, 1975. During the interim both petitioners were directed to report for a pre-sentence investigation.[6]

On February 19, 1975 Petitioners, their counsel and government counsel were present for the intended sentencing. The Court declined to proceed with sentencing because the presentence investigation reports suggest the

[4] In pertinent part 21 U.S.C. reads:

(a) "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;"

[5] Petitioners have never suggested any rule 11 infirmities; nor do they now.

[6] As per Rule 32(c), F. R. Crim. P. (reproduced as Appendix "C").

possibility of entrapment. The trial judge indicates he does not necessarily believe the presentence report "version of event" as tendered by the petitioners to the Federal Probation officer but indicates that further investigation is warranted (Petitioner's Santana version of events is reproduced as Appendix "D"; that of Rodriguez as Appendix "E").

Thereafter the cause is continued from time to time. On April 22, 1975 process is issued for the informer, Torres. On April 24, 1975 Santana and Rodriguez filed their motions for the production of the informer and to vacate the guilty pleas (R. 12).[7]

Both on May 6 and 8, 1975 the Court conducted hearings. Testimony was taken and exhibits received.[8] Torres, both petitioners and a D.E.A. agent testified. The issue at these hearings was simply whether each petitioner (or one or the other) was entrapped by Torres. The petitioners alleged that Torres supplied both the money and the source for the heroin. They (the petitioners) alleged that Torres had, prior to July 15, 1974, supplied them both with monies and a source of supply for heroin (a source that refused to deal with Torres). Needless to state Torres testified contra stating this (July 15, 1974) was the only transaction. However Torres did agree that he had been in the

[7] R. refers to record on appeal; same lodged with this Court. We deem it worthy to note that the opinion (order) affirming the conviction and sentence makes no mention of this motion. Erroneously the panel affirming the conviction finds that the motion to vacate to guilty pleas came at or after the May 6 hearing (wherein Torres, the informer, testified as a Government witness). See Appendix A, App. 3)

[8] The trial(?) transcripts are lodged with this Court. The hearings consume pages 2-187. We have condensed the testimony.

Rodriguez store a week prior and allegedly received a sample of cocaine.[9]

After May 8, 1975 both the government and defense filed memorandums relative to the vacation of the guilty pleas (the government's motion in opposition (R. 16) and the petitioner's second memorandum in support of their motion to vacate (R. 17). Each memorandum was on file with the court by May 14, 1975.

On the afternoon of June 5, 1975 the court denies petitioners a trial and states:

> The Court: That is what I am saying to you. He gave them credit for that amount of heroin, is just beyond belief.
>
> In any event, I am not going to vacate the plea. I am not going to reinstate a not guilty plea. I am prepared to dispose of the case. I gather that there isn't any reason—
>
> Mr. Ackerman: Your Honor, our position is, your Honor triggered—
>
> The Court: I am the only person who raised the question.
>
> Mr. Ackerman: I am agreeing. That is our position.
>
> The Court: I am now satisfied there is nothing to it.
>
> Mr. Ackerman: Unfortunately, the triggering device caused a certain investigation, at least for me, and unlike your Honor, I am persuaded that at the very least they should be entitled to have it submitted on a trial basis.
>
> The Court: *There is nothing to submit on a trial basis.*
>
> Mr. Ackerman: *You presume, and I don't think quite fairly, you presume that a jury would not accept their statement.* (Tr. 205, 206; emphasis ours)

[9] This tended to substantiate the "earlier transactions" account submitted by the petitioners.

After all is said and done both petitioners received prison sentences after the denial of their motions to vacate their guilty pleas. The petitioners commenced to serve their prison sentences in June, 1975. In September, 1975 each petitioner moved for bail pending disposition of their appeal; same was granted absent opposition from the government. Each petitioner is presently on bail pending disposition of this appeal.

Each petitioner moved for a rehearing with in banc suggestions; their motion was denied on February 23, 1976 (App. B, *infra*).

REASONS FOR GRANTING THE WRIT

In 1964 guilty pleas accounted for over 90 percent of all criminal convictions in United States District Courts (*Santobello* v. *New York,* 404 U.S. 257, 264, ft.nt. 1a (1971). There is certainly no reason to believe that the statistic is now lower. That being the case it seems more probable than not that this court should finally articulate just what standard is involved when a defendant seeks to withdraw a guilty plea prior to the imposition of sentence and where the government has suffered no prejudice.

The cases from this court are hardly legion. The issue is controversial and of considerable substance. The circuits are in serious dispute over what standard is to be applied while assessing the merits of a presentence motion to vacate a guilty plea.

In *Kercheval* v. *United States,* 274 U.S. 220 (1927) the court, while reversing a federal mail fraud offense opined:

> "The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just." (274 U.S. at 224).

Additional opinions touching upon the vacation of guilty pleas utilizing Rule 32(d) consider the following: in *Dandridge* v. *United States,* 356 U.S. 259 (1958) the court vacated a sentence imposed on a guilty plea with directions that *Dandridge* be permitted to change his plea. The Government "confessed error" in this court. The *per curiam* order consists of nine (9) lines and says almost nothing. In *Nagelberg* v. *United States,* 377 U.S. 266 (1964) the court vacated a guilty plea sentence on what appears to be a non-contested petition for certiorari. It seems that

Nagelberg was a government informant, but that information came to the District Court too late. The Court of Appeals affirmed the conviction (323 F.2d 936, 2nd Cir.). It appears that the Solicitor General filed a pleading which was tantamount to a confession of error (377 U.S. at 266-267).

More recently, in *Santobello* v. *New York,* 404 U.S. 257, 92 S.Ct. 495 (1971) the court vacated a state gambling conviction which had its basis in a guilty plea. The court based its opinion upon the apparent unkept promise by the State prosecutor to make no recommendation as to what sentence, if any, Santobello was to receive. Justice Marshall, with whom Justice Brennan and Justice Stewart joined, concurred and dissented, in part, stating:

> "... There is no need to belabor the fact that the Constitution guarantees to all criminal defendants the right to trial by judge or jury, or, put another way, "the right not to plead guilty", *United States* v. *Jackson,* 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed. 2d 138 (1968). This and other federal rights may be waived through a guilty plea, but such waivers are not lightly presumed and, in fact, are viewed with the "utmost solicitude." *Boykin* v. *Alabama,* 395 U.S. 238, 243, 89 S.Ct. 1709, 1712, 23 L.Ed. 2d 274 (1969). *Given this, I believe that where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained at least where the motion to vacate is made prior to sentence and judgment."* (Emphasis ours; 404 U.S. at 267, 268).

In *Dukes* v. *Warden, et al.,* 406 U.S. 250, 92 S.Ct. 1551 (1972) the court declined to grant a state prisoner relief where he alleged his guilty plea was both involuntary and

unintelligent because of an alleged conflict of interest involving his attorney. Mr. Justice Stewart, concurring, stated:

> "In *Santobello* v. *New York,* 404 U.S. 257, 267, 92 S.Ct. 495, 501, 30 L.Ed.2d 427, I joined Mr. Justice Marshall's separate opinion because I agree that "where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained at least where the motion to vacate is made prior to sentence and judgment." (*id.* at 267-268, 92 S.Ct. at 501-502).
>
> "*If a defendant moves to withdraw a guilty plea before judgment and if he states a reason for doing so, I think that he need not shoulder a further burden of proving the "merit" of his reason at that time. Before judgment, the courts should show solicitude for a defendant who wishes to undo a waiver of all the constitutional rights that surround the right to trial —perhaps the most devastating waiver possible under our constitution. Any requirement that a defendant prove the "merit" of his reason for undoing this waiver would confuse the obvious difference between the withdrawal of a guilty plea before the government has relied on the plea to its disadvantage,* and a later challenge to such a plea, on appeal or collaterally, when the judgment is final and the government clearly has relied on the plea. . ." (406 U.S. at 257, 258; emphasis ours).

The most recent pronouncements from this court suggest that the petitioners in the case at bar should have been able to withdraw their guilty plea. Their motion was in writing and supported by memorandum (R. 12) and was filed on April 24, 1975 (several weeks prior to the imposition of sentence). They wanted a trial. Such is their constitutional right (cf., *Santobello, ante,* at 267-268). The Government has never suggested they would be prejudiced had the plea been withdrawn and a trial held.

The A.B.A. Standard (approved draft, Pleas of guilty) §2.1(b) reads, in part, as follows:

> "Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea."

The several circuits are hardly in accord. A reasonable review of reported 32(d) cases indicate:

(1) That a pre-sentence request to withdraw a guilty plea should be liberally construed in favor of the accused;[10]

(2) A defendant, prior to sentencing, should be allowed to substitute a plea of not guilty and have a trial if for "any reason" the granting of the privilege seems "fair and just";[11]

(3) That leave to withdraw a guilty plea prior to sentencing should be freely allowed or granted;[12]

(4) There is a clear and marked distinction as to which burden a defendant must meet when seeking to withdraw a guilty plea. A motion *after sentencing* compels the defendant to meet the heavier "manifest injustice test"; prior to sentencing the test appears to be far more liberal with the defendant shouldering a far-lesser burden. The pre-sentence test has been variously labeled "any reason" or "fair and just";[13]

---

[10] *U.S.* v. *Stayton,* 408 F.2d 559 at 560 (3rd Cir., 1969).

[11] *Stayton, ante,* at 561, and cases therein cited.

[12] *Poole* v. *United States,* 250 F.2d 396 at 400 (DC. Cir., 1957); *High* v. *United States,* 288 F.2d 427 at 430, 431 (D.C. Cir., 1960).

[13] *United States* v. *Stayton, ante,* at 561; *Kadwell* v. *United States,* 315 F.2d 667 at 670 (9th Cir., 1963); *Kercheval* v. *United States,* 274 U.S. 220, 224 (1927).

(5) If a defendant moves to withdraw a guilty plea before judgment and states a reason for doing so the defendant need *not* shoulder a further burden of proving the "merit" of his reason at that time.[14]

In *U.S.* v. *Stayton, ante,* the court remanded, for reconsideration, the denial of that defendant's pre-sentence motion to withdraw his guilty plea to a federal counterfeiting offense. Within the text of that opinion the court observed:

> "The motion to withdraw a guilty plea protects the right of an accused to a trial. Therefore, such requests made before sentencing *"should be construed liberally in favor of the accused"* by the trial courts. Kirshberger v. United States, 392 F.2d 782, 784 (5th Cir., 1968); Kadwell v. United States, 315 F.2d 667, 670 (9th Cir., 1963); and Poole v. United States, 102 U.S. App. D.C. 71, 250 F.2d 396, 400 (1957), where the court said: *"Leave to withdraw a guilty plea prior to sentencing should be freely allowed"* (408 F.2d at 560; emphasis ours).

In *U.S.* v. *Presley, et al.,* 478 F.2d 163 (5th Cir., 1973) that court reviewed the denial of pre-sentence motions to vacate "nolo contendere" pleas to federal interstate gambling violations. The substance of the case revolved around whether *Presley* and others, after their pleas, had a legal defense to the interstate gambling charges based upon an intervening Supreme Court opinion. While reversing the refusal to vacate the "nolo contendere" pleas the *Presley* court stated:

> "Upon a jury trial appellants may be able to persuade the court as a matter of the law that they come under the Rewis protective umbrella. Failing that, they would be entitled to have the question submitted for jury determination under appropriate instruction. At the least they were entitled to try to make a record in this respect" (478 F.2d at 168).

[14] *Dukes* v. *Warden,* 406 U.S. 250; concurring opinion, Mr. Justice Stewart, 406 U.S. at 257, 258.

We note in passing that this is not a typical *post-sentence* (our emphasis) motion by defendants dissatisfied with the sentence imposed after a guilty plea (cf., *United States* v. *Wells,* 430 F.2d 225 (9th Cir., 1970); *United States* v. *Dixon,* 504 F.2d 69 (3rd Cir., 1974). Rather, this is a pre-sentence motion to vacate or withdraw a guilty plea where the only relief sought was the 5th Amendment right not to plead guilty and the exercise of the 6th Amendment right to have a jury trial (*United States* v. *Jackson,* 390 U.S. 570, 581 (1968).

We respectfully submit that the petitioners herein should have been afforded a trial. Most impermissibly the trial court conducted a hearing and found the defendants to be without a defense. Accordingly, the court refused to vacate the guilty pleas and impose the sentence now under review. What the court did was impermissive because the trial court invaded the province of a jury by going into the merits of the proffered defense. In *United States* v. *Gearhart,* 272 F.2d 499, 503 (D.C. Cir., 1959) that court vacated a conviction where the question presented was whether the trial court erred in denying a motion to vacate a guilty plea. *Inter alia,* that court found prejudicial error by the trial court as follows:

> ". . . Under the circumstanecs presented in the instant case, we think it would be quite inappropriate for the District Court to hold an evidentiary hearing to determine the question whether this accused was mentally ill at the time of the alleged offense. *Such a hearing would go to the merits of the proffered defense, and invade the province of the jury. . .*" (272 F.2d at 503; emphasis ours).

The case at bar is a duplication of *Gearhart, ante.* In this case the trial court "during a hearing aimed at the withdrawal of a guilty plea prior to the imposition of sentence" determined that the defendants had no defense. This is exactly what the court articulated at the time of sentencing:

> Mr. Ackerman: Unfortunately, the triggering device caused a certain investigation, at least for me, and unlike your Honor, I am persuaded that at the very least they should be entitled to have it submitted on a trial basis.
>
> The Court: *There is nothing to submit on a trial basis.*
>
> Mr. Ackerman: *You presume, and I don't think quite fairly, you presume that a jury would not accept their statement.* (Tr. 205, 206; emphasis ours)

In other words, the court "weighed the proffered defense of entrapment". This, was impermissive. This is exactly the reason for a trial.

The entire question of entrapment (predisposition vs. Government misconduct) is before this court in *Hampton* v. *United States,* Dkt. No. 74-5822, ... U.S. ....., cert. grted., 95 S.Ct. 1445 (1975).

After all is said and done this petition presents a simple issue worthy of review. It may well be that the Solicitor General will invite review so as to resolve the question of what standard(s) is or should be applied when a defendant seeks to withdraw a guilty plea prior to the imposition of sentence in the Federal Courts. Particularly, where, as here, the government offers no suggestion of prejudice. The several circuits are hardly in accord and the statute itself lends no suggestion to an appropriate standard for presentence relief. Being mindful that guilty pleas terminate or resolve over 90 percent of all federal criminal cases the questions presented are of substantial

import to the criminal Justice system. It would be of substantial aid to the lower courts (and to the government and the defense) were this court to simply tell us what is or is not an appropriate standard for relief where a defendant seeks to withdraw a guilty plea before sentencing.

CONCLUSION

The petitioners contend that the decision of the Court of Appeals for the Seventh Circuit affirming their convictions should be reversed. Due process invites a trial. Both in *Santobello* v. *New York,* 404 U.S. 257 (1971) and *Dukes* v. *Warden, et al.,* 406 U.S. 250 (1972) Justices of this court addressed the issue but certainly could not resolve it because neither case involved Rule 32(d); a rule promulgated by this court but not heretofore realistically interpreted by this court. Thus, plenary review is respectfully suggested as being warranted in this case.

Respectfully submitted,

Thomas P. Durkin, Esq.

Thomas P. Durkin
Ackerman, Durkin & Egan
100 N. LaSalle Street
Suite 611
Chicago, Illinois 60602
Attorneys for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
January 22, 1976.
(Argued December 4, 1975)

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. John S. Hastings, Senior Circuit Judge
Hon. Francis E. Whelan, District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 75-1526 vs.

TOMAS RODRIGUEZ and
ANGEL MANUEL SANTANA,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 74-CR-902
Hubert L. Will, Judge

ORDER

This appeal presents the single issue of whether the trial court abused its discretion in denying the defendants' motion to withdraw their pleas of guilty to an information before their sentences were imposed. Because of the

---

* United States District Judge Francis C. Whelan of the Central District of California is sitting by designation.

similarity of the issues, this appeal was heard jointly in oral argument with another pending appeal, *United States* v. *Benjamin Valle,* No. 75-1440. *Valle* will be considered separately by our court. We consider here only appeal No. 75-1526.

Defendants-appellants Tomas Rodriguez and Angel Manuel Santana were arrested on July 15, 1974, by Agent John Mann of the federal Drug Enforcement Administration in connection with the transfer of a quantity of heroin. On December 17, 1974, defendants were charged in an information with distributing approximately 814.68 grams of a mixture containing heroin, in violation of 21 U.S.C. § 841(a)(1). At all relevant times thereafter and on this current appeal, defendants were represented by competent privately employed counsel.

Following extensive plea bargaining, on January 7, 1975, all parties appeared in court and defendants properly waived indictment and voluntarily entered pleas of guilty to the offense charged in the information. We may interject here and say that we have fully read and independently examined the record and the entire transcript of the proceedings had in open court.

Before accepting the guilty pleas, the presiding federal district judge, The Honorable Hubert L. Will, extensively questioned the defendants, explained thoroughly their constitutional rights, and advised defendants and counsel that he was not bound by the plea bargain and would withhold any judgment of sentences until he had considered a presentence report. At this point, the trial court extensively explained and warned each defendant of the maximum penalty which he might be given. Then each defendant, under oath, confessed to the commission of the offense charged in the information. Thereupon each defendant personally, and through his counsel, insisted upon and did

enter his guilty plea. It is conceded that defendants have no complaint as to what was done at this stage of the proceedings. Judge Will then accepted the guilty pleas, ordered that pre-sentence reports be prepared, and set February 19, 1975, for sentencing.

On February 19, 1975, all parties appeared in court and Judge Will announced that the statements defendants gave to the probation officer had "the ingredients of entrapment." Judge Will then stated that at the time he took the pleas both defendants acknowledged that they were guilty and had entered into these transactions. He further stated that it was essential to get the matter of possible entrapment clarified and that "[w]e ought to postpone the disposition in the case until we do." All parties agreed to this.

On April 22, 1975, the court was informed that the individual who had allegedly supplied the drugs to defendants, a person known as Serano or El Lobo, was now deceased, but that the government informer, Angel Mario Torres, was in Puerto Rico. A material witness arrest warrant was issued for Torres.

On May 6, 1975, the defendants filed a motion for a hearing and the production of the informant Torres. At that time defendants indicated they would move to withdraw their guilty pleas if the government was unable to produce the informant for the evidentiary hearing. On that same day, however, the informant Mario Torres testified on the matter in open court with all parties and the court fully participating. Prior to testifying that day, Torres, who was brought back to Chicago under tight security and kept in an undisclosed jail, had not been allowed to speak with anyone connected with the case. Subsequently, defendants each filed a motion to withdraw their guilty pleas.

On June 5, 1975, Judge Will, after carefully considering all aspects of the evidence relating to the possible defense of entrapment and the guilty pleas, denied the defendants' motions to vacate their guilty pleas. After hearing both defendants speak in open court on mitigation and further having heard their counsel at length on the motions to withdraw the guilty pleas and in mitigation, the court entered judgments of conviction and sentence. Defendant Santana was sentenced to the custody of the Attorney General for a period of two years, to be followed by a three-year mandatory special parole. Defendant Rodriguez was sentenced to the custody of the Attorney General for a period of one year and one day, plus a three-year mandatory special parole. It may here be noted that the recommended plea bargain called for a sentence of two years for each defendant, plus the special parole. Defendants appealed and on September 12, 1975, were admitted to bail pending this appeal.

The applicable rule, Rule 32(d), Federal Rules of Criminal Procedure, 18 U.S.C., reads:

> (d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

We are here concerned with the first contingency in Rule 32(d), since the sentence had not yet been imposed. After the sentence had been imposed the standard to be applied is "to correct manifest injustice." No definite standard is fixed in the rule which is applicable before sentencing. It would necessarily appear to leave the motion to withdraw to rest within the sound discretion of the trial judge. We do not find that there is any *right* to withdrawal.

In holding that a plea of guilty withdrawn by leave of court is not admissible against the defendant on the trial of the issue arising on a substituted plea, the Supreme Court used language which has formed the bedrock of its progeny on the issue now under consideration. *Kercheval* v. *United States*, 274 U.S. 220, 224 (1927). There the Court held that a trial court "in exercise of its discretion" will permit a substituted plea of not guilty, "if for any reason the granting of the privilege seems fair and just." Thus, we find that the trial court will exercise its discretion where it seems to be fair and just to do so.

In *Moody* v. *United States*, 7 Cir., 497 F.2d 359 (1974), our court, speaking through Judge Sprecher, affirmed a conviction upon a similar § 841(a)(1) charge. In considering the application of FED. R. CRIM. P. 11, we held that the district court did not abuse its discretion where, even without a hearing, the defendant's motion to withdraw his guilty plea and to vacate his sentence was denied. *Id.* at 362.[1]

The "discretionary" and "fair and just" reason standards find expression in the American Bar Association's Standards for Criminal Justice, which read in appropriate part:

> Before sentence, the court in its discretion may allow the defendant to withdraw his plea for any fair and just reason unless the prosecution has been sub-

[1] In *United States* v. *Wright*, 7 Cir., 407 F.2d 952, 954 (1969), we said: "The withdrawal of a guilty plea is not an absolute right but is within the sound discretion of the trial court and will not be reversed except upon an abuse of that discretion." We there found no such abuse. In *Hansen* v. *Mathews*, 7 Cir., 424 F.2d 1205, 1209, *cert. denied*, 397 U.S. 1057 (1970), we reiterated these standards in finding no abuse of discretion in the denial of a request to withdraw a plea of guilty.

stantially prejudiced by reliance upon the defendant's plea. ABA STANDARDS, PLEAS OF GUILTY, § 2.1(b) (1968).

In *Moody*, 497 F.2d at 363-4, we cited with approval other sections of the ABA Standards.

Based upon our independent review of the record as a whole, certain things have become clear to us. The defendants' guilty pleas were made in full accord with all of the requirements of FED. R. CRIM. P. 11. The district court properly accepted the pleas. Only after a lingering doubt as to a possible defense of entrapment did the trial court wisely and compassionately postpone sentencing until such doubts had been resolved. Defendants were given every opportunity to, and did, participate fully in the proceedings held for that purpose. In our considered judgment Judge Will correctly and fairly resolved the question of entrapment adversely to defendants. He reiterated that the determination of the entrapment question was the sole purpose of the extended hearings. Having resolved that question, the judge then quite properly found in substance that there was no good reason at all why the motions to withdraw the guilty pleas should not be denied. It was an exercise of sound discretion on his part. The sentence imposed on defendant Santana was exactly the same as that recommended in the plea bargain. The sentence imposed on defendant Rodriguez was less than that recommended for the good reason that he was the less culpable of the two defendants and had a better prior record.

Having found no abuse of discretion on the part of the trial court nor any other valid reason for reversal, it is ordered that the judgments of conviction be and the same are in all respects affirmed. The Clerk of this court will enter an appropriate order.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
February 23, 1976.

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. John S. Hartings, Sr. Circuit Judge
Hon. Francis E. Whelan, District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 75-1526 vs.

TOMAS RODRIGUEZ and
ANGEL MANUEL SANTANA,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(74 Cr 902)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be, and the same is hereby, Denied.

---

* United States District Judge Francis C. Whelan of the Central District of California is sitting by designation.

APPENDIX C

(c) *Presentence Investigation.*

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

(3) *Disclosure.*

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c)(3)(A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(C) Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(D) Any copies of the presentence investigation report made available to the defendant or his counsel and the attorney for the government shall be returned to the probation officer immediately following the imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Youth Correction Division of the Board of Parole pursuant to 18 U.S.C. §§ 4208(b), 4252, 5010(e), or 5034 shall be considered a presentence investigation within the meaning of subdivision (c)(3) of this rule.

APPENDIX D

SANTANA, Angel M.

Docket No. 74 CR 902

Defendant's Version

The defendant elected to submit a written account of his involvement in the instant offense which he submitted in Spanish, and was subsequently translated by the probation department and appears below:

> Everything started with this man, who came for the first time to the store accompanied by another who was a jeweler and has or had a jewelry store.
>
> We spoke about unimportant things. On his next visit, he spoke of diamonds which according to him, were of great value. He proposed business with the gems he brought. Afterwards, he spoke of narcotics and the problems he had because he had exchanged heroin for diamonds and he had no more money at hand to buy any more. He said he knew where he would be able to get some, but he wouldn't be able to buy the amount he always did in exchange for the diamonds. Besides, he didn't want that particular person to know he was in possession of the diamonds because he feared having to hand them in as a guarantee.
>
> After talking about his personal affairs, which he did so on several occasions in which he visited the store, one day he came in and said he needed help and that he didn't want to see anybody else about it. He came accompanied by another man from whom I was supposed to buy two ounces of heroin. He offered me $50 and all I would have to do was avoid having the

> man from whom I was to buy the heroin find out that it was really for him. (first man) The transaction was easy because the man he brought knew the man I was supposed to buy it from.
>
> One week went by and he came back with $4,000, but this time he said he would leave the money and return for it the next day. The money was put away in back of the store, but that same night, someone broke the front door and took all the money. When he came the next day, the incident was explained to him. At first he was angry and made quite a few threats. We promised to pay it back but that he would have to wait. He didn't accept that and he stated that he had a better idea. He came back the next day, this time with $5,000 so that we would be able to make a transaction like the one before, and that would be the way to repay the $4,000 we owed him. There was no other way so that's the way it was done. Later, he returned and stated that everything was going to be done at the same time so that nothing would be owed to him, and he wouldn't bother us anymore. He arranged everything by phone. He said he would call me to explain how I was to make the deal, so I was to make sure of being available. When he called me he said I was to be very attentive and very cautious. He told me to give 32 "Chinas" (ounces), and five "Chinas" (ounces), eight "white ones", the 32 were to be with the 5 "Chinas" and the eight "white ones" were to be sent to another place.
>
> Then he came and I told him where he could find everything, but he wanted me to hand it to him personally. He also wanted me to accompany him so I would hand the money to the man waiting for it. I refused. I told him to have the man come over and

for him to hand the money in himself. He agreed and I informed him where he could find the other eight. About 45 minutes after he left, the police came to arrest me.

My opinion is that they fixed everything and they even broke in to take the money so that they would be able to force us to make the deals for them so they wouldn't be exposed to anything.

/s/ Angel M. Santana